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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
Petitioner,

v.

BOSTON SCHOOL COMMITTEE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Is a judicial order in a school desegregation case, directing that senior white teachers shall be laid off rather than junior black teachers, and black teachers recruited rather than white teachers recalled, equitable and constitutional, although the court found neither that the particular mathematical ratio of black teachers to white teachers that is to be maintained thereby is necessary to desegregate the schools, nor that the advantaged black teachers and applicants have been the victims of prior employment discrimination?

PARTIES TO PROCEEDING BELOW

The parties in the United States Court of Appeals for the First Circuit were: (a) plaintiffs—Tallulah Morgan, et al. as representatives of the class of plaintiffs that includes black public school students and their parents; (b) four defendants—the Boston School Committee, the City of Boston, the Massachusettts Board of Education, and the Massachusetts Commissioner of Education; and (c) four intervenors—petitioner Boston Teachers Union, the Boston Association of School Administrators and Supervisors *, the Concerned Black Educators of Boston and El comite de Padres.

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* The Boston Association of School Administrators and Supervisors has filed a separate petition for a writ of certiorari.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Local 66, Boston Teachers Union, an affiliate of the American Federation of Teachers (AFT), AFL-CIO, petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this Court to review the First Circuit's judgment in *Morgan, et al. v. O'Bryant, et al.* (C.A.1, Nos. 81-1561, 81-1617-1619 & 81-1646; Feb. 17, 1982).

OPINIONS BELOW

The June 2, 1981 order of the United States District Court for the District of Massachusetts is not reported; it is set forth at pp. A-18-A-19 of the separately bound appendix to this petition (hereafter cited "App."). The

July 24, 1981 order of the district court denying petitioner's motion for reconsideration, evidentiary hearing and stay was handwritten by the district court on the face of the motion and is not reported; its text is reprinted at App. A-17a-A17. The opinion of the United States Court of Appeals for the First Circuit is reported at 671 F.2d 23 and is reprinted at App. A-1-A-16.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the First Circuit were issued on February 17, 1982. (App. A-1, A-29-A30.) On April 23, 1982, Mr. Justice Brennan signed an order extending the time for filing a petition for writ of certiorari to and including June 17, 1982. (App. A-30.) This petition for a writ of certiorari is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause to the Fifth Amendment of the United States Constitution:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Original Finding That Respondent Boston Public School Authorities Maintained a Racially Segregated School System.

This petition arises out of and is part of an action by black parents and their children who attend the Boston public schools to desegregate those schools. That action was brought in 1972 pursuant to 42 U.S.C. §§ 1931, 1983, 2000d & 28 U.S.C. § 1343. The original defendants were the Boston School Committee (the statutory governing authority of the schools), its individual members, the Superintendent of the Boston Public

Schools, the Board of Education of Massachusetts, its individual members, and the Massachusetts Commissioner of Education. These parties to the original action are respondents in this Court together with an organization named Concerned Black Educators of Boston ("CBEB") which intervened in the course of the litigation. Petitioner Boston Teachers Union ("BTU") intervened during the course of the litigation on the issue of relief as it affects the Boston public school teachers, of which BTU is the exclusive bargaining representative.

In June 1974, the district court determined that the Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. (*Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (C.A. 1, 1974), *cert. denied*, 421 U.S. 963 (1975).) In one portion of its extensive opinion the district court determined that the school authorities' policies with regard to the faculty and staff contributed to the dual school system and discriminated against black school children. (379 F. Supp. at 456-466.) That court described plaintiffs' claims on this subject, all of which were sustained, as follows:

> Plaintiffs' principal claim involving faculty and staff is that the defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students. Plaintiffs' next claim under this heading * * * asserts a denial of equal educational opportunity, viz., that defendants have knowingly pursued policies resulting in less qualified, less experienced and lower paid teachers in predominantly black schools. A third claim is that defendants have violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, em-

ployment and promotion of teachers and staff. [379 F. Supp. at 456.]

B. The Original Orders Establishing a 20% Goal Of Black Teachers in the Boston Public Schools to be Achieved Through Hiring and Recruitment.

In January 1975 the district court issued a decision entitled "Memorandum and Orders on Faculty Recruiting and Hiring." (388 F. Supp. 581, 582.) That court reiterated that one "aspect" of the intentional segregation which it had found

> was the racial composition and distribution of faculty members in the school system. The court found the low percentage of black teachers to be a result of unconstitutionally discriminatory use of a cut-off score on the National Teacher Examination, inadequate minority recruitment efforts, and the reputation of Boston as an anti-black, segregated school system. [388 F. Supp. at 582; see also 379 F. Supp. at 463-466]

In its 1975 decision the district court "adopted 20%, approximately the black population of Boston, as an appropriate percentage goal for the hiring of black teaching faculty." (388 F. Supp. at 582.)[1] That court determined that "the presence of black teachers in numbers more closely proportionate to the number of black students in the schools is an important step" to eliminating racial discrimination. Accordingly, the district court directed that: "black and white teachers should be hired on a one-for-one basis until the percentage of black faculty in the schools reaches 20%." (388 F. Supp. at 583.) That court also directed "an affirmative minority recruitment program to continue until there is a 25% black faculty. (*Id.*). The remainder of its opinion de-

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[1] The court observed that the "percentage of a minority group in the city's population is the goal adopted in numerous other discrimination cases." (*Id.*, citations omitted).

tailed the recruitment and hiring steps the Boston school authorities were directed to undertake. (*Id.* at 584-586.)

On an appeal by BTU, the court of appeals affirmed. (530 F.2d 431, *cert. denied*, 426 U.S. 935.) That court too relied on the Boston population ratio as the foundation for the 20% goal. (530 F.2d at 433.) And the court of appeals took pains to demonstrate "that there is no reason to believe that the 20 percent figure was unrealistic":

> The availability of a substantial number of qualified black applicants (and the district court did not demand the hiring of anyone who was unqualified) was demonstrated by the fact that in the month following the court's first recruitment order on July 31, 1974, the percentage of black faculty was increased from 7.1 to 10.4 percent. This indicates that pessimism as to the prospects of finding qualified black teachers should not be overestimated. As the union points out, there may well be an oversupply of applicants for teaching positions in Boston. While affirmative action to rectify past discrimination is more painful during a time of underemployment than in one of full employment, that fact is no excuse for inadequate action. The goal set by the court has no deadline date. As the court recognized, it contemplates "a gradual increase in the number of black teachers over several years". The prospect of placing 500 additional black teachers in a teaching force of over 5,000 over several years does not seem to us to place an undue burden on the non-minority labor force. [530 F.2d at 434.] [2]

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[2] In 1978, the district court found that the school authorities had not complied adequately with the hiring order. The district court modified that order, requiring a 1.5% annual increase in black faculty until the 20% ratio is reached. (*Morgan v. McDonough*, unpublished Order on Faculty Recruiting and Hiring (D. Mass., July 5, 1978); Court of Appeals Appendix G.)

C. The 1981 Order Transforming The Hiring and Recruitment Goal Into a Direction That The Boston Public School Authorities Lay Off White Teachers on the Basis of Their Race and Prefer Black Applicants to White Laid-Off Teachers.

In early 1981, the Boston public school authorities informed the district court that they contemplated dismissal of permanent teachers because of decreased funding.[3]

On February 23, 1981, the district court requested a memorandum from the parties addressing the relationship between the original hiring order, the seniority provisions of the collective bargaining agreement between BTU and the Boston School Committee,[4] and the contemplated dismissals. In its March 4, 1981 Memorandum BTU asked the District Court to preclude dismissal of tenured teachers and requested an evidentiary hearing on "the impact of teacher layoffs on the quality of education and this Court's desegregation orders" and on funding available to avoid dismissals. No evidentiary hearing was held.

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[3] There are three categories of teachers in the Boston school system—permanent, provisional and temporary substitute. (See 379 F. Supp. at 457.) One of the findings of discrimination against black school children was that a disproportionate percentage of less qualified and experienced (i.e., provisional) teachers had been assigned to the predominantly black public schools. (*Id.* at 461-463). Massachusetts teachers acquire tenure by three consecutive years of service. (Mass. G.L. c. 71, § 41.)

[4] The collective bargaining agreement effective from September 1, 1980 through August 31, 1982 establishes "job security" for tenured teachers, and states that they "shall continue to be employed" through June 30, 1982. The agreement provides for reduction in force in reverse seniority order and for recall in seniority order. Seniority is defined as "length of professional service." (Contract between the Boston Teachers Union, Local 66, AFT, AFL-CIO and the School Committee of the City of Boston, Art. IVC, §§ 16, 17; Art. IVA, § 5. App. A-31-A-35.)

In May 1981, the school committee moved the district court for an order to allow the committee to abrogate the job security and seniority provisions in its agreement with BTU to permit the dismissal of tenured senior white teachers while retaining junior black teachers. In its memorandum supporting this request, the school committee said it was necessary to eliminate between 1200 and 1600 teaching positions. The school committee said that the percentage of black teachers would be reduced from a then current 19.09% to approximately 8% if 1200 teachers were dismissed accordingly to seniority.

The district court heard argument on the school committee's request on May 27 and 28, 1981 but took no testimony or other evidence. On June 2, 1982 the district court granted the school committee's request, ordering:

> 1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%, and the systemwide percentage of other minority teachers will remain at its current level.
>
> 2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide, which the court expects will be by March 1982.
>
> 3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black. [App. A-19.]

As a result of this order, an estimated 1100 tenured white teachers have been dismissed. And BTU is informed that at least 15 new black applicants have been employed as teachers to maintain the 20% ratio while hundreds of experienced tenured white teachers remain out of work with no prospect of recall. The precise impact of the order has not been established as there is no factual record in the district court.

On July 21, 1981, BTU moved for reconsideration of the district court's order, again requesting an evidentiary hearing. BTU argued, *inter alia*, that the district court's order erroneously placed the entire burden of maintaining during significantly changed circumstances a particular ratio of black teachers on innocent white teachers in violation of their bona fide, collectively bargained seniority rights even though the black teachers who benefit thereby are not identifiable victims of employment discrimination. BTU argued also that the order would result in a less experienced, less educationally qualified teacher force to the detriment of all public school children.

The district court denied reconsideration and an evidentiary hearing without taking oral argument or receiving responses from other parties. In its handwritten order on the cover sheet of BTU's motion, the District Court stated that the "facts" necessary to its exercise of equity power "were all known or assumed in a general way". (App. A-17.)

BTU appealed to the United States Court of Appeals for the First Circuit and that court affirmed the district court order without modification. (App. A-1-A-16.)

REASONS FOR GRANTING THE WRIT

This case presents questions of the utmost sensitivity and does so at a moment of particular urgency.

The courts below have implemented a school desegregation decree by ordering a school board that must make teacher layoffs because of financial stringencies to do so in a manner that assures that black teachers constitute 20% of the remaining teacher force. The result of this "race-conscious remedy" for pre-1975 school committee hiring discrimination is that over a thousand white teachers with tenure of up to 16 years of service have

been laid off while none of the tenured black teachers (including those with lesser service) have been laid off and at the same time new black applicants have been hired.

The long-term white teachers who carry the entire burden of accommodating to a sharply reduced school budget had no hand in crafting the unlawful pre-1975 hiring policy "remedied" by this order—they are innocent third parties to the *school committee's* violation. And neither the junior black teachers who have been retained nor the black applicants recently hired are identifiable victims of that prior school committee discrimination—indeed, the black teachers hired since 1975 are the beneficiaries of a requirement in the original court decree that a specified proportion of new hires be made on the basis of race, a requirement that provided those individuals an advantage over white applicants of the same attainments in competing for open teacher positions.

The order of the courts below mandates race preferences far exceeding any heretofore sanctioned by this Court. In both of the following respects, that order is unprecedented:

1. The courts below have decreed that senior white employees who have committed no wrong must lose their jobs in order to leave room for junior black employees and black applicants who have not themselves been the victims of employment discrimination.

2. This drastic decree has the sole objective of maintaining a percentage of black teachers equal to the black population of Boston—a result that the court of appeals determined, without a shred of corroborative record evidence, is necessary to assure that black pupils have a sufficient number of "role models" of their own race.

We show below that this order poses grave questions as to the appropriate limits of the federal courts' equitable power, and, assuming the order were held to be within that power, presents substantial unresolved questions as to the restraints imposed by the Fifth Amendment on the federal courts' power. And despite the substantial shortcomings in its rationale, the First Circuit has followed a similar approach with regard to layoffs in the Boston police and fire departments (*Boston Chapter, NAACP v. Beecher*, —— F.2d ——, 1982 BNA Daily Labor Report, No. 97-D-1-D-7 (C.A. 1; May 11, 1982)) and the Sixth Circuit has done the same with regard to the Memphis fire departments (*Stotts v. Memphis Fire Dept.*, —— F.2d ——, 28 FEP Cases 1491 (C.A. 6; May 7, 1982)).

As these decisions coming in quick succession evidence, this is a time of desperate job competition in this Nation. The unemployment rate is the highest since 1938. One person out of every ten seeking employment cannot find work. There are 178,000 fewer state and local government employees than there were a year ago. (U.S. Dept. of Labor, Bureau of Labor Statistics, *Press Release, The Employment Situation: May 1982*, U.S.D.L. 82-203 (June 4, 1982).) In short, not since the end of the great depression has a layoff been of such devastating consequence to the individual who becomes unemployed. For precisely that reason, the questions of "importance" and "human impact" (App. A-7) presented here have come to the fore. And, there is no context in which resolution of those questions is more important than that of administering the myriad of continuing school desegregation decrees issued since *Brown v. Board of Education*, 347 U.S. 483 & 349 U.S. 294.

Thus, on every count, this case is one uniquely deserving of this Court's consideration.

I. THE DECISION BELOW IS CONTRARY TO THE APPLICABLE EQUITABLE PRINCIPLES DECLARED BY THIS COURT TO GOVERN THE FASHIONING OF RACE-CONSCIOUS REMEDIAL DECREES.

A. *Swann v. Board of Education*, 402 U.S. 1, 15-16, states the basic rule applicable here—that

> • • • a school desegregation case does not differ substantially from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

See also *Brown v. Board of Education*, 349 U.S. 294, 300 (*Brown II*); *Milliken v. Bradley*, 418 U.S. 717, 737-738 (*Milliken I*); compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-422 (stating the standards for equitable relief in Title VII of the Civil Rights Act of 1964 cases). The Court in these cases thus followed the summary of the power and the duty of a court of equity in *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

And as this Court has stressed, while choices among remedies "are, of course, left in the first instance to the district courts," such "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (*Albemarle, supra*, 422 U.S. at 416, quoting *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall C.J.).)

A review of the circumstances that led to the order here makes it plain that the order does not meet the threshold requirement for an equitable remedy: the courts below had no foundation for concluding that the order would serve to repair a constitutional violation.

The district court's supplemental order at issue here rests entirely on its original order adopting 20% as "an appropriate percentage goal for the hiring of black teaching facility." The supplemental order was not accompanied by any additional findings. And the original order was *not* based on a determination that the plaintiff black school children are constitutionally entitled to 20% or any other ratio of black teachers. Rather, this figure was chosen and legally justified as "approximately the black population of Boston" (388 F. Supp. at 582).[5] The court of appeals' affirmance of that order was likewise based on the Boston population figures. (530 F.2d at 432-433.)

Indeed, the district court's oral observations in issuing the supplemental order tend to undermine the proposition that adherence to the 20% goal at the expense of incumbent white school teachers is necessary to effectuate the desegregation of the Boston public school system. The district court observed that discrimination against black students in Boston schools is "very much less than what it was before" the hiring quota order was issued and concluded that "the percentage of black faculty and staff which is required for student desegregation purposes today is, if anything, less than what was needed" when the hiring ratio was established in 1975. (App. A-25-A-26.)

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[5] The district court's original order also made provision "for an affirmative minority recruitment program, to continue until there is a 25% black faculty." (388 F. Supp. at 582.) This program involved no hiring *preferences*; rather the methods of recruiting and hiring the school board was required to follow were specified. (*Id.* at 584-586.)

Aside from treating the 20% goal as a given on the basis of its earlier decisions (A-7-A-8), the court of appeals advanced two additional rationales:

> An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980), appeal pending. [A-10-A-11.]

But there is a fundamental difference between "integrating" a faculty—that is, hiring and assigning teachers in a non-discriminatory manner—and single-mindedly insisting on a fixed mathematical ratio of black teachers based on the black population of the locality. Moreover, the "role model" theory is not based on record evidence or on a supporting district court finding.

In fact, the "role model theory" had previously been expressly *rejected* by the district court when that theory was advanced by the school board as a justification for its teacher assignments. That court had said that the record in this case is "barren of evidence supporting the argument." The only testimony on the subject here—by an associate school superintendent—was concededly "a curbstone opinion unsupported by any study or empirical data." (379 F.Supp at 460-461.) And the court of appeals' reliance on the observation in *Oliver* is far from an adequate basis for indulging a questionable sociological assumption to justify a drastic judicial order.[6] Partic-

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[6] Although there is no basis for the court of appeals' role model theory, the record and findings *do* show that the order defeats the educational interests of the school children, black and white. One of the elements of segregation against which the plaintiffs successfully complained was the disproportionate assignment of *inexperienced* teachers to identifiably black schools. (See p. 6, n.3, *supra*.)

ularly is that so given the Congressional view, expressed in § 703(e)(1) of Title VII, that race should never be "a bona fide occupational qualification"—*viz.* that an employer may never justify racial discrimination on the ground that persons of one race will better serve an employment objective than persons of another race.[7]

Since the absence of a 20% black teacher complement is not a "condition that offends the Constitution" (*Swann*,

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[7] Section 703(e)(1) provides:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *.

The failure to include "race" and "color" in the exception is conspicuous. It was noticed by Congressman Williams who offered an amendment to add those classifications to the provision. (EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3191.)

Congressman Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, spoke against the amendment:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out. [*Id.*]

Congressman Williams' amendment was defeated by a voice vote. (*Id.*) And the Senate accepted § 703(e) as written by the House.

In 1964, then, the sponsors of Title VII rejected the proposal that employers be permitted to make race-based employment decisions where those decisions would be "reasonably necessary to the normal operation" of their businesses. When in 1972 Title VII was made applicable to public employers, Congress "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." (*Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14.) But so far as we have ascertained, the only accommodation Congress appears to have made in 1972 to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act (see § 701(*f*)), an exclusion that does not embrace the teachers involved in this case.

supra, 402 U.S. at 16), the order requiring that at all costs this ratio be reached and maintained violates the most elementary requisite of a true constitutional *remedy*. (See in particular *Milliken*, *supra*, 418 U.S. at 738.)

B. Had the court of appeals established a nexus between its remedial objective and the wrong to be remedied, that court would still have been required to assess and to balance the impact of its order on innocent third parties. In this regard its opinion says only:

> We are not unmindful of the substantial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated, but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. [App. A-14, footnote omitted].

This asserted justification for imposing the "human costs" of these layoffs on incumbent white teachers and on those teachers alone is, we submit, utterly inadequate. While the fact that a substantial number of teachers would be laid off is not due to the court orders, the choice of *who* would be laid off clearly is due to those orders; otherwise the school board would have been contractually bound under its collective bargaining agreement to lay off the most junior teachers without regard to race. The object and effect of the school board's motion that precipitated the court order at issue here was to override contractual seniority. Given the actual situation before the court of appeals, it is the order that court approved that requires that senior white teachers be laid off before junior black teachers and that new black teachers be hired before senior white teachers on layoff are recalled.

Depriving innocent employees of their jobs so that others of a different race, who are not victims of the employer's discrimination, may be employed, is un-

precedented. All of the cases cited by the court below in support of the statement that "[o]ther circuits are substantially in accord" (App. A-12) go only so far as to uphold affirmative action programs in hiring and promotion. And in *Chance v. Board of Examiners*, 534 F.2d 993, 998 (C.A. 2), the Second Circuit stated the heretofor accepted limit of lawful affirmative action relief in the following terms:

> The relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City school system. * * * To require a senior, experienced white member of such a group [of employees] to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination.[8]

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[8] In the words of a respected treatise on industrial relations, "there has been a growing belief among both managements and employees that for many purposes the long-service workers are entitled to greater security and superior benefits as a matter of equity." (Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management*, p. 104 (1960)). In recognition of that equity, as this Court recently stressed,

> Seniority provisions are of "overriding importance" in collective bargaining, *Humphrey v. Moore*, 375 U.S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison*, [432 U.S. 63], at 79. * * * Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements. *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980). Section 703(h) represents the balance Congress struck between the two policies * * *." [*American Tobacco Co.*

In *Steelworkers v. Weber*, 443 U.S. 193, 208 this Court indicated that the validity of a private-sector affirmative action program embodying racial preferences turns in part on whether the program "require[s] the discharge of white workers and their replacement with new black hires." Prior to the decision below the courts of appeals had uniformly followed *Weber's* lead concerning the need to recognize the legitimate expectations of incumbents. (See, e.g., *Setser v. Novak Inv. Co.*, 657 F.2d 962, 969 (C.A. 8, en banc) and the cases collected *id.*)

In apparent recognition of the force of the precedent contrary to its position, the court below defended the result reached here by distinguishing cases such as *Chance* as dealing with the comparative claims of white and black employees while the instant case is one which sets off "the expectations of certain teachers" against "the expectations of the plaintiff class of school children and their parents." (App. A-14.) That approach is doubly defective. First, it assumes that the plaintiffs have a legitimate expectation in the 20% black teacher ratio, although that ratio had been set as a "goal" to be achieved by hiring and recruitment, and posited that there would be no "undue burden on the non-minority labor force." (See p. 5, *supra*). Second, that court's purported distinction in no way addresses the lack of equity in the impact of the order at issue here on innocent white employees.

C. We referred at the outset to the duty of a court of equity to be "the instrument for nice adjustment and reconciliation between the public interest and private needs * * *." (*Hecht Co. v. Bowles*, *supra*, 321 U.S. at 329.) A final grave defect in the lower courts fulfillment of that obligation is their failure to give appreciable

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v. Patterson, —— U.S. ——, 50 L.W. 4364, 4367-4368 (April 5, 1982).]

That balance, as *Teamsters v. United States*, 431 U.S. 324 and its successors through *Patterson* show, is highly protective of seniority rights.

weight to the incumbent white teachers' interests in not losing their jobs *because of their race*. That interest is not merely "private," but implicates the strong public interest in a racially colorblind society. Effectuation of that policy must be a major concern of a court of equity, even if it should be ultimately determined that the decree under review is within the outer reaches of judicial power.

The court of appeals observed that "race-conscious" remedies are "required where colorblind approaches would be inadequate." (App. A-12 citing *Swann*, *supra*, 402 U.S. at 28 and *Green v. County School Board*, 391 U.S. 430). That proposition does not justify the order here: the district court did not make a finding that desegregation of the Boston schools could be achieved and preserved only by mandating a 20% black teacher complement. While the court of appeals' opinion may be read as so finding, its view is without evidentiary support. (See p. 13, *supra*). More fundamentally, *Swann* itself unequivocally rejected the use of rigid racial quotas as remedies for school desegregation. The *Swann* Court said:

> [The district court's opinion] contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constitutency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. [402 U.S. at 23-24.]

The establishment of a "fixed mathematical ratio" of 20% black teachers in the Boston school system that applies no matter what cannot be reconciled with *Swann's* reasoning. And insistence on that racial balance regardless of the human costs is the antithesis of equity, which is "distinguished" by "[f]lexibility rather than rigidity." (*Hecht Co., v. Bowles*, *supra*, 321 U.S. at 329.)

II. THIS CASE PRESENTS A SUBSTANTIAL QUESTION CONCERNING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF RACE-CONSCIOUS REMEDIES.

Quite apart from the failure of the court of appeals to heed basic principles of equity, the decision below raises serious constitutional questions concerning the permissible scope of race-conscious governmental action. In two respects, the result reached in this case goes far beyond any this Court has sustained as consistent with the Constitution: first, the order below results in the loss of employment for over a thousand employees solely because of their race; and second, the courts below justified that order on only the most speculative and attenuated basis.

When this Court held, in *Bolling v. Sharpe*, 347 U.S. 497, that the rule of *Brown v. Board of Education* applies against the federal government by virtue of the Due Process Clause of the Fifth Amendment, Chief Justice Warren wrote for a unanimous Court:

> Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." And in *Buchanan v. Warley*, 245 U.S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law. [347 U.S. at 499, footnotes omitted]

Subsequent experience has shown that effectuation of the constitutional rule declared in *Brown*, *Bolling* and other cases cannot be achieved entirely without providing race-conscious remedies for past violations of the nondiscrimination principle. But this Court has consistently

scrutinized such remedies with the greatest care, because of the all but irreconcilable tension between race-conscious means and the ultimate constitutional end of a color-blind society.

The sharp divisions within this Court in these cases, most notably in *University of California Regents v. Bakke*, 438 U.S. 265, and *Fullilove v. Klutznick*, 448 U.S. 448 evidences the delicacy of the issue, and the unwisdom of any dogmatic approach thereto. This much, however, is plain: The courts below failed wholly to engage in the thoughtful and particularized analysis of the propriety of a race-conscious remedy without which, as this Court has taught, both by word and example, such a remedy may not constitutionally be sustained. Moreover, the judgment under review has by far the most serious adverse impact of any race-conscious remedy or order to come before this Court. These factors in combination are, we submit, more than sufficient to raise the most serious doubt of the correctness of the lower courts' action. And in this area of central concern to the society, resolution of that doubt is uniquely this Court's function.

The district court transformed the original hiring and promotion goal into an order directing racially based layoffs without any constitutional analysis at all. The court of appeals asserted the broad generality: "Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination." (App. A-11, citing several opinions in *Fullilove* and *Bakke*, respectively.)

Those decisions undoubtedly stand for the proposition that race *may* constitutionally be taken into account in remedying prior discrimination. But the court below disregarded one additional proposition that secured the assent of the majority of this Court—*viz.* that even where it is appropriate as a remedy any form of race

preference or disability is to be precisely crafted and most carefully scrutinized.

The opinion of the Chief Justice in *Fullilove* stressed the strong deference due to any Act of Congress (448 U.S. at 480), contrasted "the limited remedial powers of a federal court * * * with the broad remedial powers of Congress" (*id.* at 485), and recognized that even Congress

> may employ racial or ethnic classifications in exercising its spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal. [*Id.* at 480; see also *id.* at 486-487.]

Justice Stewart, dissenting for himself and Justice Rehnquist, stated: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." (*Id.* at 523.) And Justice Stevens declared: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." (*Id.* at 537, dissenting opinion; see also *id.* at 548.)

In citing *Bakke*, the court below seemingly overlooked the fact that the California Regents' admissions policy was ultimately rejected. Justice Powell in his decisive opinion in that case emphasized:

> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of

> burdens hinges on ancestry or the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. [438 U.S. at 320.]

In Justice Powell's view, as expressed in *Fullilove*, "a racial classification * * * is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest." (448 U.S. at 496, Opinion of Powell, J.)

The courts below have failed to make the finding of remedial necessity a majority of this Court has required as the minimum required to support governmental action that adversely affects any individual on the basis of race.[9]

Apart from the failure to establish remedial necessity, the courts below failed also to address, much less justify, the drastic consequences of the order at issue here: the loss of employment solely on the basis of race. In *Fullilove*, the Chief Justice observed:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by

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[9] As noted earlier, the district court made no findings in transforming a hiring "goal" into a fixed ratio which the school committee must achieve at the cost of layoffs out of seniority. And the court of appeals' assumptions in support of that order are without evidentiary support. (See p. 13, *supra*.) The burden was clearly on the proponents of this order to create the requisite record support for such an order, if they were able to do so. Having entered an order without such a showing and without findings, the district court compounded its error by denying BTU the opportunity for a hearing to demonstrate the order's severe adverse impact and the other reasons why that order is inequitable and unconstitutional.

> innocent parties is not impermissible. * * * The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. * * * [448 U.S. at 484, citations omitted; See also *id.* at 514-515 (Powell, J. concurring).]

Two Justices would have gone even further, for they expressed the view that "Under our Constitution the government may *never* act to the detriment of a person solely because of that person's race." (448 U.S. at 525, Stewart, J. dissenting.)[10]

The present case therefore goes far beyond *Fullilove* in a respect that may well be controlling of the constitutional issue: The order here deprives over a thousand identifiable individuals of existing vested rights on the basis of race, whereas *Fullilove*, and indeed *Bakke*, involved only the loss of opportunities. If the Constitution allows the government to impose that burden on an individual on the basis of his race, for some reason other than the necessity to restore some other individual who has been the victim of employment discrimination to his "rightful place," that novel doctrine should be declared by this Court, and only after the fullest deliberation.

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[10] To be sure, Justice Stewart noted that "A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race." (488 U.S. at 525, n.4, citing *Teamsters v. United States*, 431 U.S. 324; *Franks v. Bowman Transportation Co.*, 424 U.S. 747; *Swann, supra*, 402 U.S. 18-32). Here, however, there has been no evidence and no finding that any of the advantaged black teachers had been illegally deprived of a teaching position.

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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